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IN THE
Supreme Court of the United States
October Term, 1978

No. 78-1391

CHATEAU X, INC., et al.

Petitioners,

v.

**STATE OF NORTH CAROLINA,
ex rel. WILLIAM H. ANDREWS,
District Attorney for the Fourth District of
North Carolina,**

Respondent.

**BRIEF OF RESPONDENT IN RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA**

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASON WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.....	9
CONCLUSION	18
APPENDIX A	A-1
APPENDIX B	A-19

TABLE OF CASES

<i>Fehlhaber v. North Carolina</i> , 445 F. Supp. 130 (E.D. N.C. 1978)	6, 10-12
<i>Kingsley Books, INC. v. Brown</i> , 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct. 1325 (1957)	8, 11, 12, 14, 16
<i>Miller v. California</i> , 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed. 2d 419 (1972)	5
<i>Near v. Minnesota</i> , 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931).....	13-17
<i>New York Times Co. v. United States</i> , 403 U.S. 713, 29 L.Ed. 2d 822, 91 S.Ct. 2140 (1971).....	17
<i>Phalen v. Virginia</i> , 49 U.S. 163, 8 (HOW.), 12 L.Ed. 1030 (1850).....	12
<i>Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations</i> , 413 U.S. 376, 37 L.Ed. 2d 669, 93 S.Ct. 2553 <i>reh. den.</i> 414 U.S. 881, 38 L.Ed. 2d 128, 94 S.Ct. 30 (1973)	13, 16, 17
<i>State of North Carolina ex rel. Andrews v. Chateau X, Inc.</i> , 296 N.C. 251, 250 S.E. 2d 603 (1979)	1, 7-12
<i>Steward Machine Co. v. Davis</i> , 301 U.S. 548, 81 L.Ed. 1279, 57 S.Ct. 883 (1937).....	13
<i>Times Film Corp. v. Chicago</i> , 365 U.S. 43, 5 L.Ed. 2d 403, 81 S.Ct. 391 (1961).....	16, 17

CONSTITUTIONAL PROVISIONS:

Constitution of the United States Amendment I	2
Amendment XIV	2

STATUTES PRESENTED:

United States Code 28 U.S.C. §1257(3)	2
North Carolina General Statutes N.C.G.S. §14-190.2	9
N.C.G.S. §19-1.1.....	5
N.C.G.S. §19-1.1(2)	8
N.C.G.S. §19-1.2.....	6, 7
N.C.G.S. §19-1.2(1)	8
N.C.G.S. §19-4	8
N.C.G.S. §19-5	3, 5-9, 11, 13, 15, 17
N.C.G.S. §19-8.3.....	7

MISCELLANEOUS:

Freund, <i>The Supreme Court and Civil Liberties</i> , 4 VAND. L. REV. 553, 559 (1950).....	11
Holmes, <i>The Path of the Law</i> , 10 HARV. L. REV., 457, 461 (1897)	14

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OPINION BELOW

The opinion of the North Carolina Supreme Court is reported at *State of North Carolina, ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 250 S.E. 2d 603 (1979), a copy of which was appended to Petitioner's petition.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether an injunction against the future sale of "obscene materials," as that term is defined by state law, represents an unconstitutional prior restraint on rights guaranteed to the Petitioners by the First and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

AMENDMENT XIV

§1. Citizenship defined - privileges of citizens - All persons born or naturalized in the United States, and

subject to the jurisdiction therefore, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

NORTH CAROLINA STATUTORY PROVISION INVOLVED

North Carolina General Statutes §19-5

Content of final judgment and order. — If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State. Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not be sold.

Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

The provisions of this Article, relating to the closing

of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture shall be destroyed and all proceeds and moneys received therefrom, after the issuance of a preliminary injunction, forfeited.

I.

STATEMENT OF THE CASE

Respondent sets forth the salient facts of this case because of certain omissions, inaccuracies and misleading statements in the Petition for a Writ of Certiorari.

The Respondent, William H. Andrews, District Attorney for the Fourth Judicial District of North Carolina, instituted a civil nuisance abatement action, pursuant to Chapter 19 of the General Statutes,¹ against the Petitioners to enjoin them from conducting a pornographic nuisance. The case was tried in Onslow County on January 4, 1978, before the Honorable Herbert J. Small, Judge Presiding. The parties, by

¹ Chapter 19 of the North Carolina General Statutes is reproduced in its entirety in Appendix "A," *infra* at pp. A-1 thru A-18.

mutual stipulation, waived their right to trial by jury. The trial court heard evidence presented by the Respondent only, as the Petitioners chose not to present evidence. The trial court² after reviewing the evidence and making detailed findings of fact, enjoined the Petitioners from, among other things, selling obscene matter which constitutes a principal or substantial part of their stock in trade and which depicts or shows persons engaged in sodomy, per os or per anus, enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, and persons engaged in masturbation. It is this portion of the trial court's injunction, which was issued pursuant to N.C.G.S. §19-5, from which the Petitioners seek relief.

The trial court found that each of the films, books, magazines and papers seized from the Petitioners' store were, when taken as a whole by the average person applying contemporary community standards, appeal to the purient interest in sex, portrays sexual conduct in a patently offensive way, and totally lacks serious literary, artistic, educational, political or scientific value. The trial court, accordingly, found each item obscene.³ The parties had previously stipulated that the remaining items in Petitioners' inventory were substantially similar to the items individually reviewed

² The trial court's judgment is reproduced in its entirety in Appendix "B," *infra* at pp. A-19 thru A-44.

³The statutory definition of obscenity delineated in N.C.G.S. §191.1 is taken virtually verbatim from *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed. 2d 419 (1972).

by the trial court. The trial court further found that the petitioners' establishment was a pornographic nuisance as defined by N.C.G.S. §19-1.2. This nuisance abatement law focuses upon a building or place in which obscene films are exhibited in the regular and predominant course of business and obscene publications constitute a principal part of the stock in trade.

The trial court did, however, hold that one provision of §19-5 is unconstitutional. The provision stated: "Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance." The trial court's holding was based upon its reading of the provision as requiring the complete closing for all purposes of a business adjudged a pornographic nuisance.

In a previous federal case, *Fehlhaber v. North Carolina*, 445 F. Supp. 130 (E.D. N.C. 1978), appeal docketed, Nos. 78-1112 and 78-1818, 4th Cir., Feb. 24, 1978, a federal district court judge held that the provision quoted above did not authorize padlocking. 445 F. Supp. at 137. The district court judge did, nonetheless, hold that the remaining provisions of §19-5 constituted an unlawful prior restraint upon freedom of expression. 445 F. Supp. at 140. However, contrary to Petitioners' assertion on page five of their Petition, the district court judge did not hold the North Carolina nuisance statute unconstitutional in several respects. Indeed, the district court held Chapter 19 constitutional

in all other respects which the court considered for adjudication.

The Supreme Court of North Carolina, which affirmed the judgment of the trial court, held that the issue of whether §19-5 authorizes the complete closing of a theatre or bookstore after being declared a nuisance under §19-1.2 was not before it.⁴ 296 N.C. at 258, 250 S.E. 2d at 608. The court did agree with the State's concession that any complete closing of a business for past sales of obscene material would constitute an illegal prior restraint. The court added, however, that the provision of §19-5 allegedly authorizing the padlocking of a business is severable from and independent of the remaining enforcement provisions of §19-5. 296 N.C. at 259-260, 250 S.E. 2d at 608-609, citing N.C.G.S. §19-8.3. Thus, Petitioners' contention on page seven of their Petition, that the North Carolina Supreme Court did not rule on their contention that §19-5 was an unconstitutional prior restraint, is patently erroneous. In any case, the severable provision of §19-5 is not before this Court.

The Supreme Court of North Carolina held that Chapter 19 and the trial court's injunction issued pursuant thereto are constitutional. 296 N.C. at 254,

⁴The North Carolina Supreme Court refused to permit the Respondent to raise this issue on appeal since the issue had not been properly preserved under the North Carolina Rules of Appellate Procedure. The Petitioners, apparently, had also failed to preserve the issue as a basis of appeal.

250 S.E. 2d at 605. The court initially observed that §19-5 does not require the trial court to enjoin the future distribution of any and all obscene matter, as defined in §19-1.1(2), after a business has been adjudged a pornographic nuisance. 296 N.C. at 255-256, 250 S.E. 2d at 607. Further, not every isolated publication is a nuisance which can be abated under §19-1.2. An obscene book or magazine must first be found as one of many such items possessed as a principal part of the stock in trade. 296 N.C. at 257, 250 S.Ed. 2d at 607. Likewise, in order for lewd films to constitute a nuisance, they must have been publicly exhibited in the predominant and regular course of business. N.C.G.S. §19-1.2 (1).

In rejecting the Petitioners' contention that the trial judge's injunction issued pursuant to §19-5 was an unconstitutional prior restraint, the North Carolina Supreme Court tested the validity of the injunction by its operation in practice and by then comparing the effect of §19-5 with the effect of a comparable criminal statute. 296 N.C. at 263-265, 250 S.E. 2d at 610-611, *citing Kingsley Books v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S. Ct. 1325 (1957). The court noted that a defendant in a Chapter 19 nuisance proceeding, unlike the typical criminal defendant, is provided with two chances before the sanctions of imprisonment or fine may issue pursuant to §19-4. The court found that there is no procedurally significant difference between a contempt action under Chapter 19 for violation of a §19-5 injunction and the standard criminal action for selling obscene materials. Thus, the court concluded

that a §19-5 injunction is, in effect, nothing more than a personalized criminal statute. *Id.* Inasmuch as the trial court's injunction restricted the Petitioners from possessing as a principal part of their stock in trade only a specified portion of what is legally obscene, the North Carolina Supreme Court observed that "the defendants suffer less indecision as to what materials they can deal in under the injunction than they would under a usual criminal statute."⁵ 296 N.C. at 264, 250 S.E. 2d at 611.

II.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

A. The Present Conflict in the Law Must be Settled.

It is the position and suggestion of Respondent that the Petition for Writ of Certiorari should be granted so that the important constitutional right of a state to abate pornographic nuisances may be affirmed and so that the present conflict between the law as established by the North Carolina Supreme Court in *Chateau X* and

⁵In North Carolina, unlike other states, one may not be criminally prosecuted for dealing in obscene materials unless he deals in materials which have first been judicially declared to be obscene in an adversary hearing conducted prior to the criminal prosecution. See N.C.G.S. §14-190.2.

the law as established by the United States District Court for the Eastern District of North Carolina in *Fehlhaber* be settled. It is for this reason that Respondent did not, at first, file a reply to Petitioners' Petition for Certiorari.

While it might appear that Respondent's immediate self-interest would be served by denying the Petition for Certiorari, it is the belief of Respondent that it is in the long-range interest of the law that this Honorable Court should grant the Petition for Certiorari to settle the present conflict in the law.

The present state of the law is that all district attorneys in North Carolina, except those in the Federal Eastern District, are free, and indeed obliged, to commence civil nuisance abatement actions against the purveyors of hard core pornography. In order to prevent such a patently incongruous state of the law in an area as vital as the abatement of pornographic nuisances, Respondent urges this Court to grant the Petition for Certiorari so that the decision of the North Carolina Supreme Court in *Chateau X* would be affirmed and *Fehlhaber*⁶ would thereby be overruled.

⁶The United States Court of Appeals for the Fourth Circuit has stayed further proceedings in *Fehlhaber* pending this Court's disposition of *Chateau X*'s Petition.

B. The Decision of the North Carolina Supreme court in *Chateau X* was Correct and the Decision in *Fehlhaber* was in Error.

In *Chateau X*, the North Carolina Supreme Court held that N.C.G.S. §19-5, and the trial court's injunction issued pursuant thereto, were not unconstitutional prior restraints. In doing so, the Court diligently followed the teaching of this Court in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct. 1325 (1957). In *Kingsley Books, Inc.*, Justice Frankfurter, speaking for the Court, observed that "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." 354 U.S. at 441, 1 L.Ed. 2d at 1474, 77 S.Ct. at 1328. The constitutional assessment of an injunction affecting matters of expression requires a more refined analysis. "What is needed ... is a pragmatic assessment of its [the statute's] operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis. 354 U.S. at 442, 1 L.Ed. 2d at 1474, 77 S.Ct. at 1328, quoting Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 553, 559 (1951) (emphasis added).

As the North Carolina Supreme Court's opinion in *Chateau X* reveals, the injunction from which the Petitioners are seeking relief is, in effect, nothing more than a personalized criminal statute. No significant procedural differences exist between a §19-5 injunction and the standard criminal statute aimed at

purveyors of pornography. Indeed, the trial court's injunction is restricted to only a subset of what is obscene. Moreover, a Chapter 19 defendant, unlike a defendant in a standard prosecution under criminal pornography laws, is entitled to two chances before he is subject to fine or imprisonment. "Thus, the defendants suffer *less indecision* as to what materials they can deal in under the injunction than they would under a usual criminal obscenity statute." 296 N.C. at 264, 250 S.E. 2d at 611 (1979) (emphasis added).

The Court in *Fehlhaber*, by contrast, neglected to undertake a detailed analysis and pragmatic assessment of the effect of the statute's operation.

The suppression of nuisances injurious to the public health or morality is among the most important duties of government. *Phalen v. Virginia*, 49 U.S. 163, 168 (8 How.), 12 L.Ed. 1030, 1033 (1850). The State of North Carolina has, therefore, both the obligation and the right to prevent the creation and proliferation of pornographic nuisances. It cannot be gainsaid that the most effective method compatible with the First Amendment for eradicating pornographic nuisances is to enjoin their perpetuation. In fulfilling important duties of government, the State is entitled to resort to "various weapons in the armory of the law." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441, 1 L.Ed. 2d 1469, 1474, 77 S.Ct. 1325, 1328 (1957). The State of North Carolina has employed an effective weapon in its war against the corruption of the public health and morality by the purveyors of pornography. The

constitutional assessment of the weapon should, as Justice Cardozo has elsewhere noted, be guided by robust common sense. See *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 81 L.Ed. 1279, 1292, 57 S.Ct. 883, 892 (1937). Neither common sense nor the Constitution is offended by enjoining a person from conducting the pornographic nuisance which he has been maintaining. It is precisely this kind of prohibition which is mandated by N.C.G.S. §19-5.

The mandate of N.C.G.S. §19-5 is not the imposition of classical prior restraint upon the publication of ideas. Classical prior restraint is the requirement that the disseminator of a publication submit his material for governmental scrutiny and approval prior to dispersing the materials. *Near v. Minnesota*, 283 U.S. 697, 733-735, 75 L.Ed. 1357, 1376-1377, 51 S.Ct. 625, 637 (1931)(Butler, J.) (dissenting). The paradigm of classical prior restraint is the licensor's system of administrative censorship. *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, 413 U.S. 376, 389-390, 37 L.Ed. 2d 669, 679, 93 S.Ct. 2553, 2561, reh. den. 414 U.S. 881, 38 L.Ed. 2d 128, 94 S.Ct. 30 (1973). N.C.G.S. §19-5 contains no licensing requirement; nor does the statute require governmental scrutiny and permission prior to dispersing material. The statute does mandate an injunction which forbids defendants from continuing their pornographic nuisance. However, the defendants subject to the statute are free to disseminate material without prior court authorization. Hence, the statute does not require administrative approval of

material in advance of dissemination such as was exercised by the licensors at common law.

The statute merely imposes a legal duty which is subject to enforcement through the court's contempt powers. A legal duty "is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by the judgment of the court." Holmes, *The Path of The Law*, 10 Harv. L. Rev. 457, 461 (1897). Any punishment for violation of the trial court's injunction would merely be the sanction which the State is entitled to employ as a sanction for a defendant's failure to comply with his legal duty. "Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice." *Kingsley Books, Inc. v. Brown*. 354 U.S. 436, 441. 1 L.Ed. 2d 1469, 1474, 77 S.Ct. 1325, 1328 (1956) (emphasis in original). Since the imposition of a sanction by the trial court for violation of its injunction would be the imposition of a sanction *subsequent* to the continued maintenance of a pornographic nuisance, the sanction is constitutionally permissible. *Subsequent punishment* for such abuses as may exist is the appropriate remedy, consistent with Constitutional privilege." *Near v. Minnesota*, *supra*, 283 U.S. at 720, 75 L.Ed. at 1369, 51 S. Ct. at 632. (Hughes, C.J.) (Majority opinion) (emphasis added).

The instant statute is distinguishable in several important respects from the statute found

unconstitutional in *Near*. The *Near* statute authorized the State of Minnesota to obtain an injunction to suppress the *future* publication of a newspaper without the necessity of proving the falsity of the charges made in the condemned publication. *Near v. Minnesota*, *supra*, 283 U.S. at 709, 75 L.Ed. at 1364, 51 S.Ct. at 629. Indeed, in *Near* the State made no allegation that the matter published was not true. The *Near* statute permitted only the defense that the truth was published with good motives and for justifiable ends. Mere proof of truth was not a sufficient defense under the *Near* statute. The *Near* statute also placed the burden of proof upon the publisher. *Id.* 283 U.S. at 709-710, 75 L.Ed. at 1364, 51 S.Ct. at 628-629. Finally, and most importantly, the *Near* statute required the publisher to convince the Court *in advance* that any new publication of his did not violate the statute. "Whether he [the publisher] would be permitted *again to publish* matter deemed to be derogatory . . . would depend upon the court's ruling." *Id.* 283 U.S. at 712, 75 L.Ed. at 1365, 51 S.Ct. at 629. (Emphassis added). This, of course, is the essence of censorship. *Id.* 283 U.S. at 713, 75 L.Ed. at 1366, 51 S.Ct. at 630. None of these heavy handed censorial prior restraints are imposed by the North Carolina Statute. N.C.G.S. §19-5 neither places the burden of proof upon the publisher nor requires the publisher of material to submit the material to the Court for its inspection and approval prior to its dissemination.

In *Near* the court boldly stepped beyond the common law doctrine that genuine prior restraint is the restraint imposed by a system of administrative

censorship. *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, 413 U.S. 376, 389-390, 37 L.Ed. 2d 669, 679, 93 S.Ct. 2553, 2561 *reh. den.* 414 U.S. 881, 38 L.Ed. 2d 128, 94 S.Ct. 30 (1973). The teaching of *Near* and its progeny is that some, but not all, injunctions are constitutionally impermissible prior restraints. See, e.g., *Kingsley Books, Inc. v. Brown*, 354 U.S. 426, 1 L.Ed. 2d 1469, 77 S.Ct. 1325 (1957). Even if an injunction were a prior restraint, it is not *per se* violative of the Constitution. See, e.g., *Times Film Corp. v. Chicago*, 365 U.S. 43, 5 L.Ed. 2d 403, 81 S.Ct. 391 (1961).

In *Near v. Minnesota*, 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931), the United States Supreme Court established the principle that prior restraint of obscene publications is constitutionally permissible. Chief Justice Hughes, while observing that the constitutional bar against prior restraint is not absolute, enumerated some of the exceptional cases in which prior restraint is permissible.

"When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right (Citation omitted)... On similar grounds, the primary requirements of decency may be enforced against obscene publications. *Id.*, 283 U.S. at 716, 75 L.Ed. at 1367, 51 S.Ct. at 631. (emphasis added).

The principle articulated in *Near* permitting prior restraint of obscene materials remains in full force and effect. See *Times Film Corp. v. Chicago*, 365 U.S. 43, 49, 5 L.Ed. 2d 403, 407, 81 S.Ct. 391, 394 (1961). Indeed, the principle permitting prior restraint of obscene materials rests upon the proposition that obscenity is not protected by the freedoms of speech and press. See *New York Times Co. v. United States*, 403 U.S. 713, 726 & n., 29 L.Ed. 2d 822, 831 & n., 91 S.Ct. 2140, 2147 (1971) (Brennan, J.) (concurring).

The test of whether an injunction is a prior restraint is whether a "communication will be suppressed, either directly or by *inducing excessive caution* in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, *supra*, 413 U.S. at 390, 37 L.Ed. 2d at 679-680, 93 S.Ct. at 2561 (1973) (emphasis added). N.C.G.S. §19-5 does not suppress any communication in advance of its publication. Hence, the question of whether N.C.G.S. §19-5 is even a "prior restraint" can be answered by determining whether the operation and effect of the statute induces "excessive caution" of expression. Since the trial court's injunction, as well as N.C.G.S. §19-5, does not induce any greater caution of expression than the standard criminal obscenity statute, the injunction is not a "prior restraint" in the constitutional sense of the term.

CONCLUSION

For the reasons set forth above, Respondent urges that the Writ of Certiorari be issued so that the judgment and opinion of the North Carolina Supreme Court may be reviewed and affirmed.

This the 29th day of May, 1979.

Respectfully submitted,

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APPENDICES

CH. 19. Offenses Against Public Morals §19-1

Chapter 19.**Offenses against Public Morals.****Article 1.****Abatement of Nuisances.****Sec.**

- 19-1. What are nuisances under this Chapter.
 - 19-1.1. Definitions.
 - 19-1.2 Type of nuisances.
 - 19-1.3. Personal property as a nuisance;
knowledge of nuisance.
 - 19-1.4. Liability of successive owners for
continuing nuisance.
 - 19-1.5 Abatement does not preclude action.
- 19-2. [Repealed.]
 - 19-2.1. Action for abatement; injunction.
 - 19-2.2. Pleadings; jurisdiction; venue; application
for preliminary injunction.
 - 19-2.3 Temporary order restraining removal of
personal property from premises; service; punishment.
 - 19-2.4. Notice of hearing on preliminary injunction;
consolidation.
 - 19-2.5. Hearing on the preliminary injunction;
issuance.

- 19-3. Priority of action; evidence.
- 19-4. Violation of injunction; punishment.
- 19-5. Content of final judgment and order.
- 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement; invalidation of lease.
- 19-7 How order of abatement may be canceled.
- 19-8 Costs.
- 19-8.1. Immunity.
- 19-8.2. Right of entry.
- 19-8.3. Severability.

ARTICLE 1.

Abatement of Nuisances.

§19-1. What are nuisances under this Chapter.

— (a) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors, illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter, shall constitute a nuisance.

(b) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place wherein or whereon are carried on, conducted, or permitted repeated acts which create and constitute a breach of the peace shall constitute a nuisance.

(c) The building, or place, or vehicle, or the ground itself, in or upon which a nuisance as defined in subsections (a) or (b) above is carried on, and the furniture, fixtures, and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (Pub. Loc. 1913, c. 761, s. 25; 1919, c. 288; C.S., s. 3180; 1949, c. 1164; 1967, c. 142; 1971, c. 655; 1977, c. 819, ss. 1, 2.)

§ 19-1.1. Definitions. — As used in this Chapter relating to illegal possession or sale of obscene matter or to the other conduct prohibited in G.S. 19-1(a), the following definitions shall apply:

- (1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution which occur on the premises.
- (2) "Lewd matter" is synonymous with "obscene matter" and means any matter:
 - (a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts patently offensive representations of:

1. Ultimate sexual acts, normal or perverted, actual or simulated;
2. Masturbation, excretory functions, or lewd exhibition of the genitals or genital area;
3. Masochism or sadism; or
4. Sexual acts with a child or animal.

Nothing herein contained is intended to include or proscribe any writing or written material, nor to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, educational, or scientific value.

(3) "Lewdness" is synonymous with obscenity and shall mean the act of selling, exhibiting or possessing for sale or exhibition lewd matter.

(4) "Matter" means a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

- (a) Film or plate negative;
- (b) Film or plate positive;
- (c) Film designed to be projected on a screen for exhibition;

(d) Films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself, but excluding a private dwelling place not used for a profit.

(8) "Publication" shall include any book, magazine, pamphlet, illustration, photograph, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(9) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer or possession of, lewd matter. (1977, c. 819, s. 3.)

§ 19-1.2. Types of nuisances. — The following are declared to be nuisances wherein

obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved:

§ 19-1.2. Types of nuisances. — The following are declared to be nuisances wherein obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved:

- (1) Any and every place in the State where lewd films are publicly exhibited as a predominant and regular course of business, or possessed for the purpose of such exhibition;
- (2) Any and every place in the State where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;
- (3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a nuisance under this Article;
- (4) Any and every place of business in the State in which lewd publications constitute a principal or substantial part of the stock in trade;
- (5) Any and every lewd publication possessed at a place which is a nuisance under this Article;
- (6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of

narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, and every such place in or upon which acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, are held or occur. (1977, c. 819, s. 3.)

§19-1.3 Personal property as a nuisance; knowledge of nuisance. — The following are also declared to be nuisances, as personal property used in conducting and maintaining a nuisance under this Chapter.

- (1) All moneys paid as admission price to the exhibition of any lewd film found to be a nuisance;
- (2) All valuable consideration received for the sale of any lewd publication which is found to be a nuisance;
- (3) All money or other valuable consideration received or used in gambling, prostitution, the illegal sale of intoxicating liquors or the illegal sale of substances proscribed under the North-Carolina Controlled Substances Act, as well as the furniture and movable contents of a place used in connection with such prohibited conduct.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in G.S. 19-2.4 upon the place, or its

manager, or acting manager, or person then in charge, all such parties are deemed to have knowledge of the contents of the restraining order and the use of the place occurring thereafter. Where the circumstantial proof warrants a determination that a person had knowledge of the nuisance prior to such service of process, the court may make such finding. (1977, c. 819, s. 3.)

§19-1.4. Liability of successive owners for continuing nuisance. — After notice of a temporary restraining order, preliminary injunction, or permanent injunction, every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it. (1977, c. 819, s. 3.)

§ 19-1.5 Abatement does not preclude action. — The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. (1977, c. 819, s. 3.)

§ 19-2. Repealed by Session Laws 1977, c. 819, s. 4, effective August 1, 1977.

§ 19-2.1. Action for abatement; injunction. — Wherever a nuisance is kept, maintained, or exists, as defined in this Article, the Attorney General, district attorney, or any private citizen of the county may maintain a civil action in the name of the State of North Carolina to abate a nuisance under this Chapter, perpetually to enjoin all persons from maintaining the

same, and to enjoin the use of any structure or thing adjudged to be a nuisance under this Chapter; provided, however, that no private citizen may maintain such action where the alleged nuisance involves the illegal possession or sale of obscene or lewd matter.

If an action is instituted by a private person, the complainant shall execute a bond prior to the issuance of a restraining order or a temporary injunction, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than one thousand dollars (\$1,000), to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the temporary restraining order or preliminary injunction ought not to have been granted. The party enjoined shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. No bond shall be required of the prosecuting attorney or the Attorney General, and no action shall be maintained against the public official for his official action. (1977, c. 819, s. 4.)

§ 19-2.2. Pleadings; jurisdiction; venue; application for preliminary injunction. — The action, provided for in this Chapter, shall be brought in the superior court of the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application

for a preliminary injunction may be made to the court in which the action is filed which court shall grant a hearing within 10 days after the filing of said application. (1977, c. 819, s. 4.)

§ 19-2.3. Temporary order restraining removal of personal property from premises; service; punishment. — Where such application for a preliminary injunction is made, the court may, on application of the complainant showing good cause, issue an ex parte temporary restraining order in accordance with G.S. 1 A-1, Rule 65(b), preserving the status quo and restraining the defendant and all other persons from removing or in any manner interfering with any evidence specifically described, or in any manner removing or interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court granting or refusing such preliminary injunction and until further order of the court thereon. Nothing herein shall be interpreted to allow the prior restraint of the distribution of any matter or the sale of the stock in trade, but an inventory and full accounting of all business transactions involving alleged obscene or lewd matter thereafter shall be required.

Any person, firm, or corporation enjoined pursuant to this section may file with the court a motion to dissolve any temporary restraining order. Such a motion shall be heard within 24 hours of the time a copy of the motion is served on the complaining party, or on the next day the superior courts are open in the district, whichever is

later. At such hearing the complaining party shall have the burden of showing why the restraining order should be continued.

In the event a temporary restraining order is issued, it may be served in accordance with the provisions of G.S. 1 A-1, Rule 4, or may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by such service under said Rule 4, delivery and posting. The officer serving such temporary restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such temporary restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect. (1977, c. 819, s. 4.)

§ 19-2.4. Notice of hearing on preliminary injunction; consolidation. — A copy of the complaint, together with a notice of the time and place of the hearing of the application for a preliminary injunction, shall be served upon the defendant at least five days before such hearing. The place may also be served by posting such papers in the same manner as is provided

for in G.S. 19-2.3 in the case of a temporary restraining order. If the hearing is then continued at the instance of any defendant, the temporary restraining order may be continued as a matter of course until the hearing.

Before or after the commencement of the hearing of an application for a preliminary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the preliminary injunction; provided, however, the defendant shall be entitled to a jury trial if requested. (1977, c. 819, s. 4.)

§19-2.5. Hearing on the preliminary injunction; issuance. — If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court, the court shall issue a preliminary injunction restraining the defendant and any other person from continuing the nuisance and effectually enjoining its use thereafter for the purpose of conducting any such nuisance. (1977, c. 819, s. 4.)

§ 19-3. Priority of action; evidence. — (a) The action provided for in this Chapter shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions.

(b) In such action, an admission or finding of guilt of any person under the criminal laws against lewdness, assignation, prostitution, gambling, the illegal

possession or sale of intoxicating liquors, or the illegal possession or sale of substances proscribed by the North Carolina Controlled Substances Act, at any such place, is admissible for the purpose of proving the existence of said nuisance, and is evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance.

(c) At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. (Pub. Loc. 1913, c. 761, s. 27; 1919, c. 288; C.S., s. 3182; 1971, c. 528, s. 6; 1973, c. 47, s. 2; 1977, c. 819, s. 5.)

§ 19-4. Violation of injunction; punishment. — In case of the violation of any injunction granted under the provisions of this Chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred (\$200.00) or more than one thousand dollars (\$1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (Pub. Loc. 1913, c. 761, s. 28; 1919, c. 288; C.S., s. 3183.)

§ 19-5. Content of final judgment and order. — If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of

abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State. Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not be sold.

Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

The provisions of this Article, relating to the closing of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not, in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture shall be destroyed and all proceeds and moneys received therefrom, after the issuance of a preliminary injunction, forfeited. (Pub. Loc. 1913, c. 761, s. 29; 1919, c. 288; C.S., s. 3184; 1977, c. 819, s. 6.)

§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement; invalidation of

lease. — Lewd matter is contraband, and there are no property rights therein. All personal property, including all money and other considerations, declared to be a nuisance under the provisions of G.S. 19-1.3 and other sections of this Article, are subject to forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. Such property including moneys may be traced to and shall be recoverable from persons who, under G.S. 19-2.4, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendant or defendants in legal proceedings brought pursuant to this Article, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a nuisance under this Article. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and country governments wherein such activity took place, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare; provided, however, that no provision of this Article shall authorize the recovery of any moneys or gross income received from the sale of any book, magazine, or exhibition of any motion picture prior to the issuance of a preliminary injunction. Where the action is brought pursuant to this Article, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in

maintaining the nuisance. Costs of abatement include, but are not limited to, reasonable attorney's fees and court costs.

If it is judicially found after an adversary hearing pursuant to this Article that a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, prostitution, gambling, sale or possession of illegal intoxicating liquors or substances proscribed under the North Carolina Controlled Substances Act, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner. (Pub. Loc. 1913, c. 761, s. 30; 1919, c. 288; C.S., s. 3185; 1977, c. 819, s. 7.)

§19-7. How order of abatement may be canceled. — If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of

the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (Pub. Loc. 1913, c. 761, s. 31; 1919, c. 288; C.S., s. 3186.)

§19-8. Costs. — The prevailing party shall be entitled to his costs. The court shall tax as part of the costs in any action brought hereunder such fee for the attorney prosecuting or defending the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney. (Pub. Loc. 1913, c. 761, s. 32; 1919, c. 288; C.S., s. 3187; 1977, c. 819, s. 8.)

§ 19-8.1. Immunity. — The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, provided that such projectionist, usher, or ticket taker: (i) Has no financial interest in the place wherein he is so employed, and (ii) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under this Chapter, including pretrial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. (1977, c. 819, s. 9.)

§ 19-8.2. Right of entry. — Authorized representatives of the Commission for Health Services, any local health department or the Department of Human Resources, upon presenting appropriate credentials to the owner, operator, or agent in charge of

a place described in G.S. 19-1.2, are authorized to enter without delay and at any reasonable time and such place in order to inspect and investigate during the regular hours of operation of such place. (1977, c. 819, s. 9.)

§ 19-8.3. Severability. — If any section, subsection, sentence, or clause of this Article is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this Article. It is hereby declared that this Article would have been passed, and each section, sentence or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid. (1977, c. 819, s. 10.)

JUDGMENT

This cause being heard before the undersigned Judge Presiding at the January 4, 1978, session of Superior Court of Onslow County, which session and the trial of this action were extended by Order entered January 5, 1978, and it appearing to the Court that:

1. Service was obtained upon Chateau X, Inc.; Victor Stroop; ATLA Theaters, Inc.; Chateau X Theater and Bookstore; Hector Riquelme, Jr.; Joe Hornsby; Robert J. Smith; Susan Rupe; Frederick Ollie Byrom; Jimmie Tucker Hill; George A. Johnson; Albert Peloquin, and said parties are before the Court and subject to its jurisdiction.
2. At the trial the defendants Chateau X, Inc., James Russ, Albert Peloquin, Hector Riquelme, Jr., Frederick Ollie Byrom, Susan Rupe, Victor Stroop, Joe Hornsby and Robert Jerome Smith appeared through their attorneys Edward G. Bailey and Arthur M. Schwartz, and said parties are before the court and subject to its jurisdiction. It is stipulated by counsel for the plaintiff and the defendants that Jimmie Tucker Hill and ATLA Theaters, Inc., are before the Court and subject to its jurisdiction.
3. Counsel for the Plaintiff and Defendants stipulated that a trial by jury was waived, and that the Court would receive the evidence and determine the

facts from the evidence presented, make its conclusions of law based upon such findings of fact, and enter its judgment.

4. The Complaint and Answer filed in this action establish the following facts:

a. This action is brought by the State of North Carolina through the District Attorney for the Fourth Judicial District pursuant to Chapter 19 of the North Carolina General Statutes.

b. The defendant, Chateau X, Inc., is a corporation organized under the laws of the State of South Carolina and authorized to do business in the State of North Carolina. (Whenever the Court uses "Chateau X, Inc." hereafter, it is referring to said corporation.)

c. The registered office of the defendant Chateau X, Inc., is 409 Coleman Blvd., Mount Pleasant, South Carolina 29414; the registered agent at such address is James Russ; the registered office in North Carolina of the defendant Chateau X, Inc., is Highway 17 South, Jacksonville, North Carolina; and the registered agent at such address is George Johnson.

d. James Russ is a resident of South Carolina, and is an officer and managing agent of the defendant Chateau X, Inc.

e. Albert Peloquin is a resident of South Carolina.

f. The defendants Hector Riquelme, Jr., Susan Rupe, Victor Stroop, Jimmie Tucker Hill, Denise Terry Lamb, George Johnson, Joe Hornsby and Robert Jerome Smith are residents of Onslow County, North Carolina, and the defendant Frederick Ollie Byrom is a resident of Cumberland County, North Carolina.

g. Since August 1, 1977, and for some time prior thereto the defendant Chateau X, Inc., has engaged in the business of the sale of books, films and magazines to the public, and the exhibition of films to the public doing business as Chateau X Theater and Bookstore, Highway 17 South, Jacksonville, Onslow County, North Carolina. (Whenever the Court uses "Chateau X Theater and Bookstore" hereafter, it is referring to said place of business.)

h. The defendant Riquelme, Jr. is employed as manager and managing agent of the defendant Chateau X, Inc., doing business as Chateau X Theater and Bookstore, and as such is engaged at said place in the sale of books, films and magazines to the public, and the exhibition of films to the public at said place, and has been so engaged since November 4, 1977.

i. The defendant Byrom is employed as a managing agent of Chateau X, Inc., doing business

as Chateau X Theater and Bookstore, and as such is engaged at said place in the sale of books, films and magazines to the public and the exhibition of films to the public at said place, and has been so engaged since November 13, 1977.

j. The defendants Rupe, Stroop, Hill and Lamb are employed by the Chateau X, Inc., at the said Chateau X Theater and Bookstore, and as such employees are engaged at said place n the sale of books, films and magazines to the public, and the exhibition of films to the public at said place, the defendant Rupe having been so engaged since August 1, 1977, and the defendants Stroop, Hill and Lamb having been so engaged since November 28, 1977.

k. The defendants Johnson and Hornsby between August 1, 1977, and November 14, 1977, were employed by the defendant Chateau X, Inc. at said Chateau X Theater and Bookstore, and as such employees were engaged at said place in the sale of books, films and magazines to the public, and the exhibition of films to the public at said place.

l. The defendant Smith between August 1, 1977, and November 23, 1977, was employed by the defendant Chateau X, Inc. at the said Chateau X Theater and Bookstore, and as such employee was engaged at said place in the sale of books, films and magazines to the public, and in the exhibition of films to the public at said place.

From the evidence presented during the course of the trial the Court finds as a fact beyond a reasonable doubt that:

5. The defendant ATLA Theaters, Inc., is a corporation organized under the laws of South Carolina having a registered office at 4286 Leventis Road, Charleston, South Carolina, and the registered agent at such address is James Russ. The corporation is not authorized to do business in the State of North Carolina.

6. The defendants Peloquin and Russ are officers of the defendant Chateau X, Inc.

7. From September 8, 1975, through November 15, 1977, electrical power was furnished to Chateau X Theater and Bookstore, in the name of ATLA Theaters, Inc., c/o Albert Peloquin, P.O. Box 8353, Charleston, South Carolina 29407, and from November 15, 1977 until the present electrical power was furnished to the said Chateau X Theater and Bookstore in the name of Frederick Byrom, Chateau X Inc., 555 Cimarron Drive, Fayetteville, North Carolina. This power was furnished by Jones-Onslow Electric Membership Corporation.

8. Between November 4, 1977 and November 10, 1977 State's Exhibit Number 10, "Married Women" and State's Exhibit Number 11, "Story of Louis" were the only films that were exhibited at Chateau X Theater and Bookstore.

9. Between November 11, 1977 and November 15, 1977 the only films that were exhibited at Chateau X

Theater and Bookstore were State's Exhibit Number 12 entitled "Make Mine Milk" and State's Exhibit Number 13, "Baroness Nica".

10. Between November 15, 1977 and November 21, 1977 the only films shown at Chateau X Theater and Bookstore were State's Exhibit Number 14 entitled "Secret Fantasies", and State's Exhibit Number 15 entitled "Airline Cockpit", and State's Exhibit Number 16 entitled "Guess Whom Cum" and "Monster From the Blue Lagoon".

11. Between November 22, 1977 and November 28, 1977 the only films shown at Chateau X Theater and Bookstore were State's Exhibit Number 17 entitled "Unholy Child" and State's Exhibit Number 18, "Message Alone", and State's Exhibit Number 19-A and 19-B, "Count Erotica". (State's Exhibit 19 consists of two reels, 19-A and 19-B).

12. State's Exhibits numbered 10 through 14 and State's Exhibits numbered 16 through 19-A and 19-B contain substantially similar material as is contained in State's Exhibit Number 15, which was exhibited to the Court.

13. State's Exhibits numbered 1, 4, 5, 6 and 8 contain substantially similar material as is contained in State's Exhibit Number 3, which was shown to the Court.

14. State's Exhibits numbered 2, 7 and 9 contain substantially similar material as is contained in State's Exhibit Number 15.

15. State's Exhibits numbered 1 through 9 were purchased by SBI agents at Chateau X Theater and Bookstore during the period between November 4, 1977 and November 28, 1977.

16. Two of the films contained in State's Exhibits numbered 10 through 19-A and 19-B portray acts of masochism and sadism.

17. State's Exhibit 20 is an inventory of material found by Deputy Sheriff Kenneth W. Cooper at the Chateau X Theater and Bookstore, on December 12, 1977. The films listed on State's Exhibit 20 contain substantially similar material as is contained in State's Exhibit Number 15. The books and magazines listed on State's Exhibit 20 contain substantially similar material as is contained in State's Exhibit Number 3.

18. The motion picture films exhibited or distributed at Chateau X Theater and Bookstore were exhibited or distributed to consenting adults, and the books sold and distributed were sold and distributed to consenting adults within the community of the State of North Carolina.

19. State's Exhibits numbered 1 through 24 were received in evidence.

20. State's Exhibit Number 15 entitled "Airline Cockpit" is a motion picture film of four young adult females occupying an apartment, three of whom go out to find male companions while the fourth remains in the

apartment reading a book of poetry. During the course of the film each of her companions returns with a young male adult and goes into a separate room where she and her companion engage in various acts of sexual intercourse generally including normal intercourse, fellatio (female's oral stimulation of the male's penis), cunnilingus (male's oral stimulation of the female's vulva or clitoris), and anal sodomy. There are numerous scenes in which the viewer's attention is focused on enlarged exhibits of the genitals of both the male and female engaged in various acts of sexual intercourse for extended periods of time. On occasions the male is shown ejaculating on the face, body and mouth of his female partner. Throughout the film the fourth female is shown as fantasizing that she is replacing one of the other females in engaging in the various acts of sexual intercourse. The film concludes with a lesbian scene in which two females engage in oral sexual intercourse and then are joined by two males engaging the females in various acts of sexual intercourse and then exchanging female partners.

21. State's Exhibit 15 is approximately 45 minutes in duration. From the beginning until its end, it is a filthy, cynical, disgusting portrayal of explicit sexual activity. There is not word, scene or suggestion of the romantic, sentimental, poetic or spiritual aspect of any sex relation, and the scenes so exhibited on the screen utterly fail to show even bawdy sex, or comic sex, or sex described with vulgar humor. There is no glory, no beauty, no humor, no art. It is just mud. The whole film is "sick sexuality", a deliberate, studied, exercise in the

depiction of sex relations, sexual deviations, and sexual perversions. It is debasing, filthy and revolting.

22. There are valid, compelling reasons to restrain and enjoin the exhibition of this product and all like it.

23. State's Exhibit Number 3, a magazine entitled SPREAD YOUR LEGS, contains on its front and back covers enlarged color photographs of the male and female genitals while engaged in intercourse. Throughout the magazine are color photographs showing persons engaged in various acts of sexual intercourse including acts of sodomy, per os, and per anum. The whole magazine is "sick sexuality", a deliberate study in the depiction of perverted sexual relations and sexual deviations; and , it is debasing, filthy and revolting.

24. There are valid and compelling reasons to restrain and enjoin the exhibition and sale of this product and all like it.

25. State's Exhibit 3, the magazine and State's Exhibit 15, the film, and each of them, contains and depicts (2) patently offensive representations of ultimate sex acts and perverted sexual acts, and (b) patently offensive representations of masturbation and lewd exhibitions of the genitals.

26. When taken as a whole by the average person applying contemporary community standards, he would find that State's Exhibit 3, and State's Exhibit 15,

and each of them (a) appeals to the prurient interest in sex, (b) portrays sexual conduct in a patently offensive way, and (c) totally lacks serious literary, artistic, educational, political, or scientific value.

27. State's Exhibit 3, and State's Exhibit 15 and each of them is lewd, obscene, and a nuisance.

28. State's exhibit 20 contains an inventory of all motion picture films situate at the Chateau X Theater and Bookstore and each film contains substantially similar material to that contained in State's Exhibit 15. Each film contains and depicts (a) patently offensive representations of ultimate sex acts and perverted sexual acts, and (b) patently offensive representations of masturbation and lewd exhibitions of the genitals. When taken as a whole by the average person applying contemporary community standards, he would find that each film (a) appeals to the prurient interest in sex, (b) portrays sexual conduct in a patently offensive way, and (c) totally lacks serious literary artistic, educational, political, or scientific value. Each film is lewd, obscene and a nuisance.

29. State's Exhibit 20 contains an inventory of all books, magazines and papers situate at the Chateau X Theater and Bookstore and each book, magazine and paper contains substantially similar material to that contained in State's Exhibit 3. Each book, paper and magazine, contains and depicts (a) patently offensive representations of ultimate sex acts and perverted sexual acts and (b) patently offensive representations of masturbation and lewd exhibitions of the genitals. Each

book, paper and magazine when taken as a whole by the average person applying contemporary community standards, he would find that each book, amgazine and paper (a) appeals to the prurient interest in sex, (b) portrays sexual conduct in a patently offensive way, and (c) totally lacks serious literary, artistic, educational, political or scientific value. Each book, paper and magazine is lewd, obscene and a nuisance.

29a. The films identified as State's Exhibits 2, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19-A and 19-B contained substantially similar material to that contained in State's Exhibit 15. Each film contains and depicts (a) patently offensive representations of ultimate sex acts and perverted sexual acts, (b) patently offensive representations of masturbation and lewd exhibitions of the genitals. When taken as a whole by the average person applying contemporary community standards, he would find that each film (a) appeals to the prurient interest in sex (b) portrays sexual conduct in a patently offensive way, and (c) totally lacks serious literary, artistic, educations, political or scientific value. Each film is lewd, obscene and a nuisance.

29b. The magazines identified as State's Exhibits 1, 4, 5, 6 and 8 contains substantially similar material to that contained in State's Exhibit 3. Each magazine contains and depicts (a) patently offensive representations of ultimate sex acts and perverted sexual acts, (b) patently offensive representations of masturbation and lewd exhibitions of the genitals. Each

magazine when taken as a whole by the average person applying contemporary community standards, he would find that each magazine (a) appeals to the prurient interest in sex, (b) portrays sexual conduct in a patently offensive way and (c) totally lacks serious literary, artistic, educational, political or scientific value. Each magazine is lewd, obscene and a nuisance.

30. Other articles found upon the premises and itemized in the inventory of State's Exhibit 20 include lotion, potions, pills, powders, and erotic devices designed to appeal to an individuals prurient interest in sex and are lewd.

31. Throughout the evidence presented to the Court the theme stated and restated is depravity and perversion repugnant to good conscience and detrimental to public health and morals.

32. None of the defendants make an attempt to justify any of the filth confiscated as a work redeemable by claiming artistic value, educational value, political value, or scientific worth. None of the defendants attempt to present a case or a hypothetical situation wherein the films, magazines, or other lewd material might have some semblance of social value, or even a modicum of artistic, literary, scientific, education or other merit to be considered for justification of its exhibition or sale. The defendants stand firm upon their supposed constitutional right to knowingly show obscene films and other lewd publications for profit, or to sell such for profit, all of which are utterly without redeeming social importance or value and constitute

lewd and obscene, hard core pornography. The defendants contend that this court is utterly powerless to enjoin such future conduct.

33. During the period from November 4, 1977, to December 12, 1977, Chateau X, Inc. possessed at its place of business the Chateau X Theater and Bookstore for the purpose of public exhibition at such place of business lewd and obscene motion picture films in the regular course of its business, and the public exhibition and sale of said films were a predominant and regular course of the business. During the said period of time lewd and obscene films were publicly and repeatedly exhibited and possessed for the purpose of public and repeated exhibition at the Chateau X Theater and Bookstore.

34. The defendant Chateau X, Inc. maintained as a principal and substantial part of its stock in trade at its place of business at Chateau X Theater and Bookstore lewd and obscene publications consisting of magazines, books, newspapers, and films.

35. All defendant employees of Chateau X, Inc. working at the place of business at Chateau X Theater and Bookstore had knowledge of its principal business, had knowledge of its predominant business, and had knowledge that the principal and substantial part of the stock in trade maintained by the defendant Chateau X, Inc. at said place of business was lewd and obscene motion picture films and publications consisting of magazines, books, and newspapers and that the same were possessed for public exhibition and sale.

36. All defendant officers of the defendant, Chateau X, Inc. had knowledge that the predominant and regular course of business conducted by Chateau X, Inc. upon the premises at Chateau X, Theater and Bookstore was the public exhibition of lewd and obscene films and that lewd and obscene publications consisting of magazines, books, papers and films constituted a principal and substantial part of the stock in trade of said defendant at said place of business.

37. The defendant officer and employees had knowledge of the facts found in paragraphs 35 and 36 because each would testify that all distributions and exhibitions were made to consenting adults within North Carolina.

38. The defendant Chateau X, Inc., through its officers, agents, and employees establish, maintain and use the building and premises situate at Chateau X Theater and Bookstore for the purpose of illegal possession for sale, sale, and public exhibition of lewd and obscene matter and thereby did establish, continue and maintain a nuisance upon said premises.

39. The defendants, over an extended period of time consisting of five (5) weeks sold, distributed, and publicly exhibited lewd and obscene, hardcore pornographic motion picture films, magazines, books, and papers at Chateau X Theater and Bookstore.

40. Without stipulating that any of the foregoing findings of fact are based upon evidence presented to

the Court, it is stipulated by counsel for the Plaintiff and the Defendant that none of the writing or written material contained in State's Exhibits 1 through 19-A and 19-B and contained in any of the items listed in State's Exhibit 20, if considered by the Court would alter the findings of the Court based upon the evidence presented during the trial.

41. That the Chateau X Theater and Bookstore is a theater and motion picture establishment which in the regular, predominant and ordinary course of its business shows and demonstrates lewd and obscene films and motion pictures.

42. That State's Exhibits 10-19 A&B are lewd films which were publicly exhibited and possessed for the purpose of public exhibition by the Defendants at the Chateau X Theater and Bookstore so as to constitute the said films a nuisance.

43. That the Chateau X Theater and Bookstore is a place used by the Defendants for the purpose of selling, exhibiting or possessing for the purpose of sale or exhibition lewd and obscene publication in the regular course of business.

UPON THE FOREGOING FINDINGS OF FACT,
THE COURT MAKES THE FOLLOWING
CONCLUSIONS OF LAW:

a. Implicit in the history of the first amendment to the United States Constitution is the rejection of

obscenity as it is without redeeming social importance or value. Sex and obscenity are not synonymous. Obscenity is not protected by Freedom of Speech or Freedom of the Press. *Roth v. U.S.*, 354 US 476 (1957).

b. Legislation enacted in the exercise of police power for the benefit of the public is as extensive as may be required for the protection of the public's health, safety, morals, and general welfare of the people. *State Ex Rel. Taylor v. Racing Assn.*, 241 NC 80 (1954).

c. The State's ability to regulate the dissemination of obscene materials is settled beyond dispute. *Miller v. California* 413 US 15 (1973). The choice of a civil nuisance procedure as the regulatory means is permissible, *Kingsly Books, Inc. v. Brown*, 354 US 436 (1957).

d. The second paragraph of North Carolina General Statute, Section 19-5 reads: "Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance." The United States Supreme Court has repeatedly declared provisions such as this unconstitutional whenever there is an attempt to infringe upon the Freedoms of Speech and Press by an injunction enjoining future publications. In regulating the illegal possession or sale of obscene or lewd matter as defined by Chapter 19 of the N.C. General Statute, this provision is unconstitutional. It is ineffectual in

actions to regulate the illegal possession or sale of obscene or lewd matter; and pursuant to GS 19-8.3, it shall not affect the remaining portions of Chapter 19.

e. This Court may not enjoin the defendants from the future sale, distribution, possession, and exhibition of all movies, magazines, and books without regard to their contents; but, it is unwilling to hold that there is not a method which can be found to stop conduct of parties such as shown by this record.

f. When taken individually and as a whole, the lewd and obscene matter is a portrayal of sexual conduct in a patently offensive way without serious literary, artistic, educational, political or scientific value, and its only appeal is to the prurient interest in sex, and it is utterly without redeeming social importance and constitutes hard core pornography.

g. It is within the power of the judiciary to enjoin the continued sale and display of hard core pornography. *Miller v. California*, 413 US 15, 37 L Ed, 2d 419, 93 S Ct 2607 (1973). If this Court limits its injunction to a particular item by describing each title, it would require the State to bring suit each time the defendants change the obscene menu in the passion pit, thereby rendering it impossible for the State to enforce its prohibition against the illegal possession or sale of obscene and lewd matter.

h. The film State's Exhibit 15, is lewd, obscene and a nuisance.

i. The films identified as State's Exhibits 2, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19-A and 19-B are lewd, obscene, and a nuisance.

j. All films inventoried in State's Exhibit 20 are lewd, obscene and a nuisance.

k. The magazine, State's Exhibit 3, is lewd, obscene, and a nuisance.

l. The magazines identified as State's Exhibits 1, 4, 5, 6 and 8 are lewd, obscene and a nuisance.

m. The magazines, books, and papers inventoried in State's Exhibit 20 are lewd, obscene, and a nuisance.

n. All materials substantially similar to the film identified as State's Exhibits 2, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19-A and 19-B and all materials substantially similar to the books, magazines, and papers identified as State's Exhibits 1, 3, 4, 5, 6 and 8 and all films, books, magazines, and papers substantially similar to those included in the inventory contained in State's Exhibit 20 are lewd and obscene and constitute a nuisance. The illegal possession for sale and public exhibition thereof as provided by Chapter 19 of the N.C. General Statute constitutes a nuisance.

o. The defendants, Chateau X, Inc., Riquelme, Byrom, Rupe, Stroop, Hill, Lamb, Johnson, Hornsby, Smith, ATLA Theaters, Inc., Peloquin and Russ maintained at the Chateau X Theater and Bookstore, a place of business where lewd films were publicly exhibited as a predominant and regular course of business and the same constitutes a nuisance.

p. The defendants, Chateau X, Inc., Riquelme, Byrom, Rupe, Stroop, Hill, Lamb, Johnson, Hornsby, Smith, ATLA Theaters, Inc., Peloquin, and Russ maintained a place of business at the Chateau X Theater and Bookstore where they possessed for the purpose of public exhibition as a predominant and regular course of business lewd films and the same constitutes a nuisance.

q. Every lewd film identified as State's Exhibits 2, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19-A and 19-B was possessed at the Chateau X Theater and Bookstore by the defendant for the purpose of repeated public exhibition and constitutes a nuisance. (And all those listed in the inventory in State's Exhibit 20.)

r. The defendants, Chateau X, Inc., Riquelme, Byrom, Rupe, Stroop, Hill, Lamb, Johnson, Hornsby, Smith, ATLA Theaters, Inc., Peloquin, and Russ maintained a business at Chateau X, Theater and Bookstore where lewd publications constituted a principal or substantial part of the stock in trade and the same constitutes a nuisance.

s. All the publications identified as State's Exhibits 1, 3, 4, 5, 6 and 8 and all lewd books, papers, and magazines inventoried on State's Exhibit 20 constitute a principal and substantial part of the stock in trade of the place of business at the Chateau X Theater and Bookstore and the same are a nuisance.

t. All lewd and obscene films containing matters which is substantially similar to that contained in State's Exhibits 2, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19A and 19-B and containing matter which is substantially similar to the lewd and obscene films inventoried in State's Exhibit 20 are lewd, obscene and constitute a nuisance when possessed for the purpose of public exhibition in the predominant and regular course of business.

u. All lewd and obscene publications of books, magazines, and papers containing material substantially similar to that contained in State's Exhibits 1, 3, 4, 5, 6 and 8 and containing material substantially similar to the books, papers and magazines inventoried in State's Exhibit 20 are lewd and obscene and constitute a nuisance when possessed for sale as a principal and substantial part of the stock in trade of a place of business.

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that:

1. All lewd matter consisting of films, books, magazines and papers and copies thereof, in the

possession of the defendants, or situate at the Chateau X Theater and Bookstore, identified as State's Exhibit 1 through 19 and listed on the inventory State's Exhibit 20 be seized by Sheriff of Onslow County and the same are hereby confiscated. The Sheriff of Onslow County is directed to destroy the same.

2. The defendants, Chateau X, Inc., Riquelme, Byrom, Rupe, Stroop, Hill, Lamb, Johnson, Hornsby, Smith, ATLA Theaters, Inc., Peloquin, and Russ and each of them be, and they are hereby enjoined and restrained from:

a. possessing, selling or possessing for sale, the lewd matter, or copies thereof, identified as:

State's Exhibit 1, a magazine entitled SAVAGE SEX
 State's Exhibit 2, a film entitled "Quadro Sex Pro"
 State's Exhibit 3, a magazine entitled SPREAD YOUR LEGS

State's Exhibit 4, a magazine entitled ABDUCTION
 State's Exhibit 5, a magazine entitled EASY CUM
 State's Exhibit 6, a magazine entitled YOUNG & TENDER

State's Exhibit 7, a film entitled "Babe"
 State's Exhibit 8, a magazine entitled HIPPIE SEX
 State's Exhibit 9, a film entitled "Lusty Girls"
 State's Exhibit 10, a film entitled "Married Women"
 State's Exhibit 11, a film entitled "Story of Louis"
 State's Exhibit 12, a film entitled "Make Mine Milk"
 State's Exhibit 13, a film entitled "Baroness Nica"
 State's Exhibit 14, a film entitled "Secret Fantasies"
 State's Exhibit 15, a film entitled "Airline Cockpit"

State's Exhibit 16, a film entitled "Guess Whom Cum" and "Monster From the Blue Lagoon"
 State's Exhibit 17, a film entitled "Unholy Child"
 State's Exhibit 18, a film entitled "Massage Alone"
 State's Exhibit 19-A & 19-B, a film entitled "Count Erotica"

b. Possessing, selling or possessing for sale, the lewd matter consisting of films, magazines, books and papers, or copies thereof, listed on the inventory in State's Exhibit 20, a copy of which is attached hereto and made a part thereof to the same extent as if herein set out verbatim.

c. Exhibiting or possessing for exhibition to the public the lewd films or copies thereof, included in the State's Exhibits or listed on the inventory of State's Exhibit 20.

d. Possessing for exhibition to the public illegal, lewd matter consisting of films which appeals to the prurient interest in sex without serious literary, artistic, educational, political or scientific value and that depicts or shows:

(1) Persons engaging in sodomy, per os, or per anum,

(2) [Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or]

PLAINTIFF'S EXCEPTION NO. 1

(3) Persons engaging in masturbation.
 DEFENDANTS' EXCEPTION NO. 2

e. [Possessing for sale and in selling illegal lewd matter which constitutes a principal or substantial part of the stock in trade]

PLAINTIFF'S EXCEPTION NO. 2

at a place of business consisting of magazines, books, and papers which appeal to the prurient interest in sex without serious literary artistic, educational, political, or scientific value and that depicts or shows:

(1) Persons engaged in sodomy, per os, or per anum

(2) [Enlarged Exhibits of the genitals of male and female persons during acts of sexual intercourse, or]

PLAINTIFF'S EXCEPTION NO. 3

(3) Persons engaging in masturbation
 DEFENDANTS' EXCEPTION NO. 3

The Sheriff of Onslow County shall forthwith post a copy of this notice at all doors entering the Chateau X Theater and Bookstore and all persons are hereby notified that the removal, defacing, or destruction of any part of this judgment so posted including the attached copy of State's Exhibit 20, shall be an act in contempt of Court and shall subject said persons to punishment for Contempt of Court.

4. All persons going upon the premises of the Chateau X Theater and Bookstore and while on said premises shall be, and they are hereby enjoined and restrained from:

a. Selling or possessing for sale, the lewd matter, or copies thereof, identified as:

State's Exhibit 1, a magazine entitled SAVAGE SEX
 State's Exhibit 2, a film entitled "Quadro Sex Pro"
 State's Exhibit 3, a magazine entitled SPREAD YOUR LEGS

State's Exhibit 4, a magazine entitled ABDUCTION
 State's Exhibit 5, a magazine entitled EASY CUM
 State's Exhibit 6, a magazine entitled YOUNG & TENDER

State's Exhibit 7, a film entitled "Babe"
 State's Exhibit 8, a magazine entitled HIPPIE SEX
 State's Exhibit 9, a film entitled "Lusty Girls"
 State's Exhibit 10, a film entitled "Married Women"
 State's Exhibit 11, a film entitled "Story of Louis"
 State's Exhibit 12, a film entitled "Make Mine Milk"
 State's Exhibit 13, a film entitled "Baroness Nica"
 State's Exhibit 14, a film entitled "Secret Fantasies"
 State's Exhibit 15, a film entitled "Airline Cockpit"
 State's Exhibit 16, a film entitled "Guess Whom Cum" and "Monster From the Blue Lagoon"
 State's Exhibit 17, a film entitled "Unholy Child"
 State's Exhibit 18, a film entitled "Massage Alone"
 State's Exhibit 19-A & 19-B, a film entitled "Count Erotica"

b. Selling or possessing for sale, the lewd matter consisting of films, magazines, books and papers, or copies thereof, listed on the inventory in State's Exhibit 20, a copy of which is attached hereto and made a part hereof to the same extent as if herein set out verbatim.

c. Exhibiting or possessing for exhibition to the public the lewd films or copies thereof, included in the State's Exhibits or listed on the inventory of State's Exhibit 20.

d. Possessing for exhibition to the public illegal, lewd matter consisting of films which appeals to the prurient interest in sex without serious literary, artistic, educational, political or scientific value and that depicts or shows:

(1) Persons engaging in sodomy, per os, or per anum

(2)[Enlarged exhibits of the genitals of male and female persons during act of sexual intercourse, or]

PLAINTIFF'S EXCEPTION NO. 4

(3) Persons engaging in masturbation.
 DEFENDANTS' EXCEPTION NO. 4

e. [Possessing for sale and in selling illegal lewd matter which constitutes a principal or substantial part of the stock in trade]

PLAINTIFF'S EXCEPTION NO. 5

at a place of business consisting of magazines, books, and papers which appears to the prurient interest in sex without serious literary, artistic, educational, political, or scientific value and that depicts or shows:

(1) Persons engaged in sodomy, per os, or per anum,

(2) [Enlarged Exhibits of the genitals of male and female persons during acts of sexual intercourse, or]

PLAINTIFF'S EXCEPTION NO. 6

(3) Persons engaging in masturbation.

DEFENDANTS' EXCEPTION NO. 5

5. The costs of this action are taxed against the Defendants.

This the 13th day of January, 1978.

Judge Presiding

s/HERBERT SMALL

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Brief of Respondent in Response to Petition for Writ of Certiorari to the Supreme Court of North Carolina were served this day on Arthur M. Schwartz, P.C. and Bailey, Raynor & Erwin, by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to:

Arthur M. Schwartz, P.C.
1650 Market Street
Denver, Colorado 80202

Bailey, Raynor & Erwin
323 New Bridge Street,
Jacksonville, North Carolina 28540

This the 29th day of May, 1979.

RUFUS L. EDMISTEN
Attorney General

MARVIN SCHILLER
Assistant Attorney General